No. 03-101

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GAIL NORTON, Secretary of the Interior, *et al.*,
Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF *AMICUS CURIAE* OF MONTANA WILDERNESS ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether 5 U.S.C. §706(1), which provides subject matter jurisdiction "to compel agency inaction unlawfully withheld or unreasonably delayed," permits judicial review of an agency's failure to fulfill its unequivocal statutory mandate to preserve the wilderness character of federal lands.

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INTEREST OF AMICUS CURIAE

Montana Wilderness Association ("MWA")[1] was founded in 1958 to protect Montana's wilderness, wildlife habitat, and traditional recreational opportunities, such as back-packing, horse-packing, hunting, fishing, and wildlife appreciation. MWA's representatives frequently appear before Congress on a host of wilderness and forest management issues. MWA was instrumental in securing the passage of the federal Wilderness Act of 1964 and the Montana Wilderness Study Act of 1977. It played a major role in obtaining the wilderness designation of every such area in Montana, the wild and scenic designations of the Missouri and Flathead rivers, and the national monument status for the Upper Missouri River Breaks. MWA actively participates in local, state, and federal administrative proceedings affecting Montana's public lands, including Forest Service and Bureau of Land Management planning processes.

MWA has played a leading role in several cases concerning wilderness protection. *See, e.g., Montana Wilderness Association, Inc. v. U.S. Forest Service,* 655 F.2d 951 (9th Cir. 1981); *Montana Snowmobile Association v. Wildes*, 103 F. Supp. 2d 1239 (D. Mont. 2000) (as Defendant-Intervenor). Most recently, and of special significance here, MWA is the lead plaintiff in *Montana Wilderness Association, Inc. v. U.S. Forest Service*, 314 F.3d 1146 (9th Cir. 2003) (*MWA)*, which raises issues closely related to the issues before this Court in *Norton v. Southern Utah Wilderness Alliance (SUWA)*. Both cases focus on the availability of judicial review under 5 U.S.C. §706(1) to

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Montana Wilderness Association affirms that no counsel for any party in this case authored this brief in whole or in part, and also affirms that no person or entity, other than Montana Wilderness Association, has made a monetary contribution to the preparation or submission of this brief.

challenge an agency's failure to take statutorily mandated action to protect the wilderness character of wilderness study areas. The Forest Service filed a petition for a writ of certiorari in the *MWA* case, which is being held pending the decision in *Norton v. SUWA*.

Amicus seeks to supplement the argument of Respondents Southern Utah Wilderness Alliance, *et al.*, by explaining, with reference to the Forest Service's obligations under the Montana Wilderness Study Act, that the District Court had subject matter jurisdiction under §706(1) to hear the suit, that the suit and resulting remedy did not intrude upon the agency's management discretion, and that absent judicial review the wilderness character of the wilderness study areas will be irreparably harmed.

Pursuant to Supreme Court Rule 37.3, written permission from all parties for MWA to file this brief has been lodged with the Clerk of the Court.

STATEMENT

When it enacted the Montana Wilderness Study Act of 1977, Congress directed the Forest Service to maintain the then-presently existing wilderness character and potential of several wilderness study areas in Montana. The record in *MWA v. U.S. Forest Service* demonstrates that the Forest Service has failed to maintain wilderness values associated with these unique and irreplaceable resources, thereby causing irreparable injury. The Bureau of Land Management ("BLM") contends that interested parties may not seek redress in district court for such injuries.

This Court should reject BLM's argument. Judicial review of an agency's failure to act, in violation of an express statutory mandate, is essential to ensure agency compliance with the statute. Barring judicial review would create a zone of agency immunity from its blatantly unlawful and irreparably harmful inaction. The Administrative Procedure Act expressly permits such suits, and such suits do

not intrude impermissibly upon the agency's expertise and management discretion.

A. The Montana Wilderness Study Act

Congress has long recognized the wilderness potential of the National Forests in the high mountains of Montana.[2] For example, when it enacted the Wilderness Act of 1964, 16 U.S.C. §§1131-1136, Congress designated several wilderness areas within National Forests in Montana.[3] Congress also instructed the Forest Service to review certain areas for possible designation as wilderness. 16 U.S.C. §1132(b). Completed in 1972, the Forest Service's review rejected nine areas in Montana, comprising 973,000 acres, for further wilderness study. H.R. Rep. No. 620, 95th Cong., 1st Sess. 2 (1977) ("House Report"). Congress subsequently enacted the Montana Wilderness Study Act of 1977 ("MWSA"), Pub. L. No. 95-150, 91 Stat. 1243 (1977), specifically listing those nine areas as wilderness study areas ("WSAs") and requiring the Forest Service to complete a study of each WSA and recommend whether to designate any as wilderness.[4]

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[2] The Montana high mountains were largely unsettled in the nineteenth century and consequently remained part of the public domain, first as Forest Reserves and later as part of the nation's first National Forests. Today, the U.S. Forest Service manages 16,893,000 acres in Montana.

[3] See Pub. L. No. 88-577, §3, 78 Stat. 891 (1964) (designating the Bob Marshall, Selway-Bitterroot, Cabinet Mountains, Gates of Mountains, and Anaconda-Pintler Wilderness Areas). In subsequent years, Congress designated other portions of Montana National Forests as wilderness areas. See Pub. L. No. 93-632, §2(d), 88 Stat. 2155 (1975) (Mission Mountains Wilderness); Pub. L. No. 95-237, §2(k), 92 Stat. 43 (1978) (Welcome Creek Wilderness); Pub. L. No. 95-249, 92 Stat. 162 (1978) (Absaroka-Beartooth Wilderness); Pub. L. No. 95-546, 92 Stat. 2062 (1978) (Great Bear Wilderness).

[4] Congress enacted the MWSA a year after it enacted the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§1701-1785. Their substantive mandates for interim wilderness protection are slightly different. Unlike FLPMA, the MSWA directly designates certain

> Congress further directed that
>
> the wilderness study areas designated by this Act *shall*, until Congress determines otherwise, be administered by the Secretary of Agriculture so as to *maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System*.

Pub. L. No. 95-150, §3, 91 Stat. 1244 (1977) (emphasis added). The Forest Service's twin duties—to "maintain their presently existing wilderness character" and to "maintain their . . . potential for inclusion in the National Wilderness Preservation Program"—reflected Congress' twin directives to ensure that recreationists could continue to enjoy these wild and primeval areas and to preserve Congress' option to designate them as wilderness. S. Rep. No. 163, 95th Cong., 1st Sess. 2 (1977) ("Senate Report").

B. Montana Wilderness Study Areas

Congress expressly proclaimed the importance of preserving the wilderness character of these WSAs. The 1977 Senate and House reports accompanying the bill documented and extolled the unique attributes and outstanding wilderness values making these WSAs worthy of congressional consideration as wilderness areas and necessitating interim protection until Congress acted. Today, the MWSA still protects the following seven WSAs:[5]

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wilderness study areas, Pub. L. No. 95-150 §2(a), whereas FLPMA gives the Bureau of Land Management the responsibility to designate wilderness study areas. 43 U.S.C. §1782(a). In addition, the MSWA requires the Secretary of Agriculture to "maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System," Pub. L. No. 95-150, §3, 91 Stat. 1244, whereas FLPMA requires the Secretary of the Interior to manage the wilderness study areas "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. §1782(c).

[5] In 1983, Congress designated large portions of the Taylor-Hilgard WSA as the Lee Metcalf Wilderness Area (named after one of the sponsors of

a. *Hyalite-Porcupine-Buffalo Horn (Hyalite)*. This WSA encompasses over 150,000 acres of the Gallatin Mountain Range. Bordering Yellowstone National Park and home to grizzlies, lynx, and wolves, all protected under the Endangered Species Act, 16 U.S.C. §§1531-1544, the Hyalite spans alpine meadows, pristine mountain lakes, and craggy peaks. It is "[a] magnificent mountainous area entirely without roads or other significant signs of man's work." 121 Cong. Rec. 1332 (Jan. 27, 1975). The 1977 Senate Report explained that "[l]arge numbers of elk, deer, moose, bighorn sheep, mountain goats, and grizzly bear and other wildlife migrate between Yellowstone Park and the proposed study area, often wintering in the Porcupine drainage and along the Gallatin River." Senate Report at 5. The Senate Report concluded that the WSA "is a major viewing area for millions of Park visitors. Each year, many thousands of hunters, fishing enthusiasts, sightseers, and other recreationists enjoy the wild Gallatin country of the Hyalite-Porcupine-Buffalo Horn." *Id.*

b. *West Pioneers*. Located in southwest Montana, the West Pioneers WSA comprises 150,000 acres of lakes and rolling, high-elevation forests, including the world's oldest living stand of lodgepole pines and alpine larch more than 700 years old. It is located in cowboy country, and has been used by outfitters for big game hunting and pack and saddle trips for decades. The WSA serves as the headwaters for "high quality blue ribbon trout streams of national significance. The endangered grayling and cutthroat trout

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the 1977 MWSA), and it released the remaining lands in that WSA for other uses. Pub. L. No. 98-140, §2, 97 Stat. 901 (1983). Congress also released the entire Mount Henry WSA for logging and other multiple uses. *Id.* §3. Although Congress passed a bill in 1988 designating wilderness in six of the seven remaining WSAs, the President pocket vetoed the bill, thereby leaving intact the Forest Service's statutory duty to "maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System."

are indigenous to the natural streams and lakes of the West Pioneer area. Both vanishing species require essentially an undisturbed aquatic environment to survive. In addition, the area serves as important elk and moose summer range." Senate Report at 2-3; *see also* House Report at 5.

c. *Sapphires*. The Sapphires WSA spans the crest of the Sapphire Mountains in west-central Montana, bordering the Anaconda-Pintler Wilderness on the western slope of the Continental Divide. It links a string of wilderness areas, thereby providing a crucial corridor for wildlife. This WSA harbors large populations of big game and provides the headwaters for important trout streams. House Report at 7. "Some 1,000 elk and numerous moose inhabit the proposed study area. Also present are the rare lynx, pine marten, fisher, wolverine, and a remnant herd of bighorn sheep. All of the species depend largely on a wilderness environment for their survival." Senate Report at 4. The WSA is "heavily used by residents of Missoula and the Bitterroot Valley for wilderness camping, hunting, fishing, backpacking, horseback trips, sightseeing, and photography." *Id.*

d. *Ten Lakes*. Located along the Canadian border, the Ten Lakes WSA is a sub-alpine paradise of mountain lakes and coniferous forests. It "encompasses one of the two remaining grizzly bear habitats in the entire Kootenai National Forest. The endangered westslope cutthroat trout, as well as the Rocky Mountain whitefish, Dolly Varden, rainbow, and eastern brook trout, are found in the many beautiful natural lakes and streams of the area. Also present in the area are elk, moose, mountain lion, lynx, wolverine, deer, and black bear. All of these species except for deer and black bear require wild surroundings to survive." Senate Report at 4.

e. *Middle Fork Judith*. The Middle Fork Judith WSA lies east of the Continental Divide in an isolated range of

mountains rising from the Great Plains. The WSA "contains the beautiful and wild reaches of the Middle Fork and Lost Fork of the Judith River and a highly scenic canyon of 1,000-foot limestone cliffs. Over 1,000 elk rely on the proposed study area for spring, summer, and fall range. Spring use includes the critical elk calving period, during which time cow elk seek out remote, undisturbed areas. The Middle and Lost Forks represent the only significant undeveloped elk habitat left in national forest lands in central Montana." Senate Report at 4.

f. *Big Snowies*. The Big Snowies WSA is a unique "island" mountain range that rises abruptly from the surrounding Central Montana prairie. It is "one of extremely few potential wilderness areas in Central Montana—a region which presently is completely lacking in designated wilderness." 121 Cong. Rec. 1332 (Jan. 27, 1975). Mountain goats, elk, bears, and wolverines traverse deep canyons and expansive alpine meadows. The Senate Report noted that "[t]he primeval area is used for wilderness camping, hunting, hiking, horseback riding, and sightseeing as hundreds of Boy Scouts and other citizens use the area each year for wilderness purposes." Senate Report at 5.

g. *Blue Joint*. This WSA borders the Frank Church River of No Return Wilderness Area, part of the largest concentration of wilderness in the lower 48 states. The area provides excellent habitat for bighorn sheep, black bear, and elk, and "supplies ideal country for quality wilderness hunting, hiking and backpacking." Senate Report at 3. In 1977, the Blue Joint WSA had no development other than foot trails and one-half mile of unimproved road that was "rapidly converting to nature." *Id.*

C. The Growing and Irreparable Impact of Off-Road Vehicles in WSAs

When it enacted the MWSA, Congress recognized that a few off-road vehicles (ORVs) were used in some parts of

some WSAs (uses that would be prohibited in designated wilderness areas), House Report at 4-5, and the legislation permitted those pre-existing uses to continue as long as the Forest Service maintained the "presently existing" wilderness character of the WSAs. The record shows that ORV use was quite modest in 1977. Old jeep tracks reached a few scattered mining claims; trail bikes—two-wheeled motorcycles designed to handle mountain trails—used a few trails; and an extremely small number of snowmobiles operated in the WSA's. MWA's Supplemental Excerpts of Record, Ninth Circuit Nos. 01-35713, 01-35690 (hereafter "ER") 002, ¶7; ER 009, ¶¶3-5; ER 016, ¶¶2-3; ER 025, ¶¶2-3.

The limited scale of motorized use in 1977, in terms of the number of vehicles, their frequency of use, and their impact on wilderness values, underscores the fact that the WSAs were wild, primeval country, and explains why Congress directed the Forest Service to maintain their presently existing wilderness character and their potential for wilderness designation. Congress was prepared to accommodate some ORV use, but not at the expense of its twin directives to provide a genuine wilderness experience for traditional recreationalists and to preserve its option to designate these areas as wilderness.

ORV use and its impact on WSAs have grown rapidly and dramatically since the mid-1980s. Fueled by changes in ORV design, including especially increases in overall size and engine power, the rising popularity of ORVs among the general public has eroded the wilderness character of Montana WSAs and undermined their suitability for inclusion in the National Wilderness Preservation System. Because an area may be designated as wilderness only if it "retains its primeval character," appears to be shaped "primarily by the forces of nature with the imprint of man's work substantially unnoticeable," and "has outstanding

opportunities for solitude or a primitive and unconfined type of recreation," 16 U.S.C. §1131(c), increased ORV use not only threatens to take away wilderness values for recreationalists, but also to usurp Congress' prerogative to designate wilderness areas.

ORVs, including snowmobiles and four-wheeled all-terrain vehicles, have scarred the land, damaged habitat for endangered and other species, driven out game animals, injured indigenous vegetation and spread noxious weeds, and ruined the wilderness experience for back-packers, horse-packers, and campers. All-terrain vehicles have churned fragile mountain soils to create new paths to lakes and meadows and have widened many miles of pack and saddle trails. ER 046, ¶¶4, 5. The Forest Service not only has been aware of the growing use of ORVs and the resulting significant environmental impacts, it also allowed and encouraged this use.[6] ER 148 at 14-24. Under the guise of "trail maintenance," the Forest Service brought in trail-building machines to convert pack and saddle trails to all-terrain vehicle roads, and it allowed snowmobile groups to groom trails.[7] ER 064-66; 070-072; 076; 081.

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[6] For example, pack and saddle trails were not open to all-terrain vehicles because a federal regulation prohibited vehicles wider than 40 inches on any recreation trail (whether or not in a WSA). 42 Fed. Reg. 2956-59 (Jan. 14, 1977). The Forest Service changed the regulation in 1990 to give local foresters discretion to allow wider vehicles on trails. 55 Fed. Reg. 25,830 (June 25, 1990). Thereafter, all-terrain vehicles were permitted in WSAs, even though the Forest Service never made a formal decision to allow all-terrain vehicles on pack and saddle trails.

[7] The Forest Service fully understands that ORV use may damage wilderness character and may make an area unsuitable for wilderness designation. The Forest Service's Recreation Opportunity Spectrum Manual (ROSM), which delineates the basic framework for recreation management, recognizes that the physical presence of a road may be the determinant criterion in determining whether an area provides opportunities for "primitive recreation," as required by 16 U.S.C. §1131(c) for wilderness designation. ROSM included as Appendix C at

Increased ORV use since 1977 has caused significant, irreparable impacts in six of the remaining seven WSAs. Cowboy-outfitter Chris McNeil explained in his declaration: "[I]n 1970s the West Pioneers was ideal for a genuine wilderness pack trip. The occasional motorbike was not a big problem and there were no [all-terrain vehicles]. Now we face the possibility of being run out of business by an explosion of motorized use." ER 008. McNeil identified approximately 35 miles of trails in the West Pioneers WSA that had become roads for all-terrain vehicles. He explained that excessive motorized use has driven mountain goats from the area, and that "the once narrow unmaintained trail to Stone Lake has been churned into a small road by [all-terrain vehicles]," ruining the "once fantastic fishery" through overuse. ER 009. McNeil, who has used the West Pioneers WSA for his outfitting business for the past 25 years, estimated the number of motor vehicles on one trail, which had been widened to become an all-terrain vehicle "loop drive," had increased seven to ten times since 1977, and further observed that "much of the increase is from four-wheel all-terrain vehicles which were never on these trails in 1977." ER 009.

In the Sapphires WSA, the Forest Service expanded Trail 313 from a pack and saddle trail to a mini road traversing the WSA. ER 003-004, and accompanying photographs at ER 006-007. All-terrain vehicle use has proliferated since 1977, resulting in "extensive areas of erosive soils. . . . With continuous use by motorized recreational vehicles, I believe it doubtful these raw soil areas would ever be able to heal." ER 004 (Nicholls Decl.). The Forest Service also added a

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http://www.fs.fed.us/recreation/programs/beig/. Moreover, on January 7, 2004, the Forest Service Chief "identified unmanaged recreation, especially the undesirable impact from OHVs [off-highway vehicles], as one of the key threats facing the Nation's Forests and grasslands today." http://www.fs.fed.us/recreation/programs/ohv/External_Handout_1_7_04.pdf.

motorized loop trail, creating an all-terrain vehicle route to several mountain lakes, and even issued a permit allowing an outfitter to conduct motorized guided trips into this potential wilderness area, without public notice or evaluation of the permit's impacts on the WSA. Federal ER 45 (Civil Docket #26, 27, Intervenor declarations).

In the Hyalite WSA, outfitter Chuck Kendall described "2-track roads going through what used to be pristine meadows and untouched sidehills. . . . Where one [all-terrain vehicle] goes, they all go." ER 001. According to Kendall, the "impacts of the ORV use detracts from the wilderness characteristic of the area in that they are an ugly reminder of man's intrusion into a once pristine area," ER 001, and the damage done in 1996 (the year *MWA v. U.S. Forest Service* was filed) "was more extensive than I've ever seen." ER 001. Kendall, who has used the Hyalite WSA for over 30 years, reported that no all-terrain vehicles were present in the 1970s and 1980s, but that he is now threatened with losing his business because he can no longer provide his guests with a "quality backcountry experience." ER 001.

Franklin Culver, who has used the Hyalite for over 40 years, found the same problem in other areas of this expansive WSA. Attached to Culver's declaration are dozens of photographs depicting "damage to vegetation, soils and wetlands" caused by all-terrain vehicle use. ER 026. He also documented new permanent orange trail blazes, which mark user-created routes and encourage ORV users to leave designated routes. ER 028. Culver catalogued more than 30 trails in the WSA that allow all-terrain vehicles. Pls. Exhibit in Support of Summary Judgment, Docket Entry #69.

In 1990, against the advice of its own wildlife biologist, the Forest Service authorized a local snowmobile club to establish a new groomed snowmobile route into the Hyalite WSA in Rock Creek, a key wildlife area near Yellowstone

National Park. *Id.* Exh. 2M. The wildlife biologist had warned that establishing a new snowmobile route would "encourage or attract" increasing numbers of snowmobiles into an area where use previously had been "low," and that greater numbers of snowmobiles potentially would adversely affect grizzly bears, bighorn sheep, and other big game. *Id.* Exh. 2N.

Norm Newhall, who has hiked and camped in the Middle Fork Judith WSA for five decades, recalled that in the 1960s motorized use occurred only along a primitive jeep road leading to a private inholding in the WSA. ER 040-041. Beginning in the 1980s, however, "the number of roads proliferated significantly, thereby indicating a dramatic increase in the amount of vehicle use." ER 043. All-terrain vehicles using an old wagon/jeep road paralleling the Middle Fork of the Judith, a pristine trout stream, have created multiple stream crossings that have caused "significant damage from erosion." ER 044. Based on his intimate knowledge of the area and his repeated visits over five decades, Newhall concluded that ORV use has "increased dramatically in the last 20 years." ER 045.

The Ten Lakes Scenic Area, within the Ten Lakes WSA, was closed to motorized use in 1977 "to preserve the enjoyment of visitors whose recreation activities required the peace and quiet of the primitive forest." Admin. Rec. Vol. 4, Book 6, Doc. 78. The Forest Service, however, subsequently relaxed this restriction and entered into cooperative snow-grooming arrangements with the local snowmobile club. Snowmobilers cut a permanent mile-long swath through pristine forests within the WSA, which then became the primary access route for snowmobiles into the scenic area. ER 081-083. Snowmobile use is now heavy; 47 machines were counted entering the WSA on one winter morning. Pls. Exhibit in Support of Summary Judgment, Exh. 5C (Johnson Decl.) Mark Johnson, a local ski guide who held a Forest

Service Special Use permit, abandoned his back country ski-guiding business in the Ten Lakes WSA in part because the wilderness character his clients valued was compromised by excessive snowmobile use. *Id.*

In addition to scarring the land, ORVs adversely affect wilderness character and potential in other ways. By carrying seeds in their tire treads, all-terrain vehicles spread noxious weeds to remote areas. Noxious weeds, in turn, eradicate native vegetation that serves as forage for big game animals. Noxious weeds have infested hundreds of thousands of acres of Montana's backcountry, in part because of growing use of all-terrain vehicles.

Increased ORV use also contributes to the decline of important animal populations. Snowmobile use causes caused grizzly bears and wolverines to abandon their dens. ER 051-052 (Dr. Sara Jane Johnson Decl., citing Forest Service studies). All-terrain vehicles and snowmobiles displace elk, forcing them to seek other habitat. ER 050 (Dr. Sara Jane Johnson Decl.). Snowmobile-compacted trails harm lynx, an endangered species, by giving the lynx's competitors a means to traverse deep snow. www.fs.fed.us/r1/planning/lynx/reports/DEIS/Summary1.pdf *see also* 65 Fed. Reg. 16081 (Mar. 4, 2000) (rule listing lynx as endangered). Although Congress extolled the outstanding wildlife resources and undisturbed habitat found in the WSAs in 1977, and although the Forest Service's own scientists have shown that ORV use may adversely affect wildlife, the Forest Service never has measured how or to what extent burgeoning ORV use affects wildlife in Montana's WSAs.

Despite the undeniable link between increased ORV use and the degradation of wilderness values, the Forest Service has done little to maintain the wilderness character and potential of the WSAs. With the limited exception of an area closure order for the Hyalite WSA, issued after suit was

filed, the Forest Service has not acted to stop or even moderate the huge growth of ORV use, and in many cases it has taken steps, such as widening trails and building bridges, to facilitate that use.[8] Before this litigation, the Forest Service failed to evaluate the effects of ORVs on wilderness character (which would have allowed it to determine whether it was maintaining wilderness values), and failed to take any steps to maintain wilderness character and potential.[9] As the District Court noted, the Forest Service erroneously believed that it had no legal obligation to maintain wilderness character as it existed in 1977. *Montana Wilderness Association, Inc. v. U.S. Forest Service*, 146 F. Supp. 2d 1118, 1123 (D. Mont. 2001).

BLM hypothesizes that suits, such as *Norton v. SUWA* and *MWA v. U.S. Forest Service*, erode the administrative process by encouraging interested persons to go directly to court. BLM Br. 33-34. The record in the *MWA* case, however, reveals years of persistent requests to the Forest Service to fulfill its statutory duties to maintain the

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[8] The Forest Service took these steps under the guise of trail maintenance, thereby avoiding judicial review under §706(2). In another case, MWA challenged a change in trail restrictions permitting all-terrain vehicles to use pack and saddle trail in one national forest, but the District Court dismissed the case for lack of subject matter jurisdiction because the change was not a final agency action. *Montana Wilderness Association, Inc. v. U. S. Forest Service*, CV 00-199-M-DWM.

[9] In 2003, 26 years after the MWSA was passed, the Forest Service prepared a travel management plan (part of the relief sought in the lawsuit) for the Big Snowies WSA, and therein addressed for the first time the Forest Service's duties under the MWSA and the impacts of motorized use on wilderness character and potential. Big Snowies EA at http://www.fs.fed.us/r1/lewisclark/projects/bigsnowy/bigsnowy/htm. The travel management plan resulted in a number of steps to preserve the wilderness character of that WSA. MWA has not challenged the travel plan as arbitrary and capricious under §706(2).

"presently existing" wilderness character and wilderness potential of the WSAs.[10]

MWA's local chapters and individual members repeatedly voiced concerns about the degradation of wilderness values caused by increased ORV use in specific WSAs. Typical of these efforts is a 1994 letter by MWA member and past president Doris Milner to the Bitterroot National Forest about ORVs in the Sapphires WSA:

> As you know, the greater the number of users of wilderness [si dy] areas by motorized machines, the greater the threat to an area's wilderness quality. . . . I do not believe that it is the intent of the Bitter Root Forest to allow the use of motorized recreation machines to wear down the wilderness quality of the Sapphires, but on the other hand, neglect of this activity seems to indicate very little concern about the situation and the consequences if such activity is allowed to continue.

Admin. Rec. Vol. 3a, Book 5, Sec. 12, Doc. 67, p. 30. Ms. Milner asked the Forest Service to institute an "oversight program" to "monitor the pattern" of motorized use "both in summer and winter." The Forest Service, however, simply continued to build new all-terrain vehicle roads, widen existing roads, and authorize new snowmobile routes, all without assessing whether it was maintaining "presently existing" wilderness character and potential. MWA and co-plaintiff Friends of the Bitterroot wrote the Forest Service in 1992, 1993 and 1994 about snowmobile grooming, but the

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[10] Because the Forest Service never made a formal decision to increase ORV use, interested parties could not invoke the Forest Service's administrative appeal process. *See* 36 C.F.R. pt 215. Thus, the usual avenue for administrative review—the type of review process that occurs after the Forest Service has taken a final action, such as approving a timber sale or constructing a new trail—was not available. By failing to take final agency action, the Forest Service evaded the administrative review process.

Forest Service refused to analyze the effects of snowmobile grooming and increased snowmobile use. Admin. Rec. Vol. 3a, Book 5, Sec. 12, Doc. 67, pp. 1-4, 8-11, 13-15, 24-25, 29-30, 38. Ski guide Mark Johnson repeatedly pleaded with the Forest Service to maintain the wilderness character of the Ten Lakes WSA by curbing excessive snowmobile activity. ER 085. The Forest Service, however, entered into cooperative arrangements with a local snowmobile club to groom snowmobile routes leading into the WSA. Pls. Exhibit in Support of Summary Judgment Exh. 5C (Johnson Decl.).

D. Procedural History of *Montana Wilderness Association, Inc. v. U.S. Forest Service*

By the mid-1990s, ORV use, including use of all-terrain vehicles and snowmobiles, was significantly and permanently degrading the wilderness values of the WSAs. The Forest Service was not simply unresponsive to MWA's requests, it had abandoned its statutory duty to maintain the wilderness character and potential of the WSAs. As a result of the Forest Service's failure to act over many years, and in the face of degraded wilderness character and potential, MWA and two other grass-roots organizations filed suit in 1996 against the Forest Service.

The 11-count complaint alleged that the Forest Service failed to maintain the "presently existing" wilderness character and potential of six of the WSAs created in the Montana Wilderness Study Act.[11] All parties moved for summary judgment, which focused on three counts.[12] In

[11] Because MWA had no evidence of ORV damage in the Blue Joint WSA, it did not include that WSA in this suit.

[12] The District Court dismissed Counts IV, V, VII and VIII when it determined they were subsumed under Count I, dismissed Counts II, IX, and X for failure to exhaust administrative remedies, and held that Count XI was superfluous. *Montana Wilderness Association, Inc. v. U.S. Forest Service*, 146 F. Supp. 2d 1118, 1120 (D. Mont. 2001).

particular, MWA alleged that (a) in each WSA the Forest Service allowed "substantially increased motorized use," resulting in "increased environmental damage, disruption of wildlife and despoiling of aesthetic values" in violation of the congressional mandate to "maintain" the WSAs (Count I); (b) the Forest Service's "improvement of erosion bars and placement of new bridges and plastic culvert pipes has so improved trails" in the Hyalite-Porcupine-Buffalo Horn WSA as "to encourage motorized use and diminish the study area's wilderness characteristics and suitability for wilderness designation" (Count III); and (c) the Forest Service "dynamited boulders, placed crushed gravel, and constructed new trails" in the West Pioneers WSA, thereby "encouraging increased motorized use and compromising the wilderness quality of the area." (Count VI). *Montana Wilderness Association, Inc. v. U.S. Forest Service*, 146 F. Supp. 2d 1118, 1120 (D. Mont. 2001). With their cross motions for summary judgment, the Forest Service submitted a 47-volume administrative record and plaintiffs submitted 19 declarations and numerous exhibits from horse-packing outfitters, ranchers, wilderness guides, and long-time users of the WSAs, all attesting to the damage caused by ORVs since 1977.

The District Court held that the statutory language in the MWSA expressly created two separate duties for the Forest Service: (1) to "maintain" WSAs "presently existing wilderness character" and (2) to "maintain" their "potential for inclusion in the National Wilderness Preservation System." *Id.* at 1123. The District Court rejected as unreasonable the Forest Service's interpretation of the MWSA as requiring it only to maintain the WSAs for eventual congressional designation as wilderness. The Court concluded that the Forest Service's interpretation not only ignored statutory language requiring it to maintain the "presently existing character" of the WSAs, but also that the two obligations were not co-extensive. "[M]aintaining the

land's potential for designation as Wilderness does not necessarily ensure the maintenance of their 1977 'presently existing' wilderness character." *Id.*

The District Court then held that it had subject matter jurisdiction under 5 U.S.C. §706(1) to adjudicate Count I and granted plaintiff's motion for summary judgment. Because the Forest Service had misinterpreted the MWSA to require it to maintain the WSAs only for eventual wilderness designation, it "failed to consider whether, how, and to what extent its management decisions have impacted the wilderness character of the areas as they existed in 1977." *Id.* at 1126. Accordingly, the Court concluded that "the Forest Service has 'unlawfully withheld or unreasonably delayed' its maintenance of the Montana Wilderness Study Areas' 1977 wilderness character." *Id.* The District Court also held that it had subject matter jurisdiction under §706(2) to adjudicate Counts III and VI, which pertained to the Forest Service's actions in the Hyalite-Porcupine-Buffalo Horn and West Pioneers WSAs, and granted summary judgment on those counts as well. *Id.*

Before granting relief, the District Court expressly recognized the Forest Service's "unique expertise" to implement the MWSA. *Id.* at 1126. Its relief was correspondingly circumspect. It granted a declaratory judgment that the Forest Service had violated the MWSA "by failing to administer the Montana Wilderness Study Areas so as to maintain each area's wilderness character as it existed in 1977," *id.* at 1127, and, it enjoined the Forest Service "from taking any action" in the WSAs "that diminished the wilderness character of the area as it existed in 1977 or that diminished the area's potential for inclusion in the National Wilderness Preservation System" and to "take reasonable steps to restore the wilderness character of any [WSA] as it existed in 1977 if the area's wilderness character or its potential for inclusion in the National

Wilderness Preservation System has been diminished since 1977." *Id.* The Court carefully avoided intruding upon the Forest Service's day-to-day management of the WSAs.

The Forest Service appealed on the ground that the District Court lacked subject matter jurisdiction. Judge Trott, writing for a unanimous court, first held that the trail maintenance and improvement work in Counts III and VI did not constitute final agency action subject to review under §706(2). *Montana Wilderness Association, Inc. v. U.S. Forest Service*, 314 F.3d 1146, 1150 (9th Cir. 2003) (holding that routine maintenance work was not "final" action (citing *Bennett v. Spear*, 520 U.S. 154, 177 (1997)), and that trail maintenance does not fit into the statutorily defined categories for "agency action" (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 899 (1990) and 5 U.S.C. §551(13)). Thus, it reversed the District Court judgment on Counts III and VI. Second, the Court of Appeals held that the District Court would have subject matter jurisdiction over Count I if plaintiffs made a showing of "'agency recalcitrance . . . in the face of clear statutory duty or . . . of such magnitude that it amounts to an abdication of statutory responsibility.'" 314 F.3d at 1150 (quoting *ONRC Action v. Bureau of Land Management*, 150 F.3d 1132, 1137 (9th Cir. 1998)). It rejected the Forest Service's argument that its statutory duties were discretionary, holding that the statutory duty to maintain the WSAs was a nondiscretionary, mandatory duty that the Forest Service could be compelled to carry out under §706(1). *Id.* at 1151 ("the Act does more than provide a mere policy statement or general guidance; it establishes a management directive requiring the Forest Service to administer the Study Areas to 'maintain' wilderness character and potential for inclusion in the Wilderness System"). The Ninth Circuit concluded, however, that because the Forest Service had presented some evidence that it had maintained the wilderness character of the WSAs, thereby creating a genuine issue of material fact,

summary judgment was inappropriate, and it remanded the case for trial. *Id.* at 1152.

SUMMARY OF THE ARGUMENT

The district courts in both *MWA v. U.S. Forest Service* and *Norton v. SUWA* had subject matter jurisdiction to hear claims that each agency's failure to act—failure to comply with express statutory duties to preserve wilderness values—was causing irreparable injury. Such suits are expressly permitted by §706(1) so long as the failure to act is final. In *MWA v. U.S. Forest Service,* the Forest Service not only failed to act for two decades, but even refused to acknowledge its statutory duty, thereby causing significant irreparable harm to unique resources of substantial public value. In these circumstances, the Forest Service's failure to act was final. Neither the litigation nor the District Court's carefully crafted remedy impermissibly intruded upon agency management discretion.

ARGUMENT

Section 706(1) Gives the District Court Subject Matter Jurisdiction to Compel the Forest Service to Maintain the Presently Existing Wilderness Character and Potential of the Montana Wilderness Study Areas

BLM asserts that a district court has no jurisdiction to review an agency's failure to act, even though the failure to act violates an express statutory mandate and causes irreparable harm to unique wilderness resources. BLM contends that the agency's failure to act is not final because the action to be compelled—maintaining presently existing wilderness character and potential—is not a "discrete" action, and because such suits would impermissibly intrude upon the agency's day-to-day management decisions. This argument should be rejected. The APA expressly permits such suits, the agency's failure to act in both *Norton v. SUWA* and *MWA v. U.S. Forest Service* is final, and a district

court's remedy need not (and in *MWA* does not) intrude upon the agency's management discretion.

A. Section 706(1) Expressly Creates Subject Matter Jurisdiction to Review an Agency's Final Failure to Act

The Administrative Procedure Act expressly permits judicial review of an agency's failure to act. It defines "agency action" as including "the whole or part of an agency rule, order, . . . or *failure to act*." 5 U.S.C. §551(13) (emphasis added). Thus, under the APA, agency inaction is a type of agency action. This definition is hardly surprising, for common experience teaches that the failure to make a decision is itself a decision that may have serious consequences. Of course, not all agency inaction is subject to review. Rather, the failure to act must be a "final agency action," *id.* §551(13), that is, a "final ['failure to act']." Further, the APA defines both the scope of judicial review of an alleged failure to act and the remedy: "The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed." *Id.* §706(1). That is, a court faced with a claim of agency failure to act must determine whether the agency "unlawfully withheld or unreasonably delayed" action and whether that failure to act is final, and if so, the court must "compel" that action.

Implicit in §706(1) is the requirement that the agency have an unequivocal mandatory duty to act. *See Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (where "an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review"). The statutory duty must leave no doubt that the agency must act, even though the precise details of the agency's action—how it executes its duty—may be left to the agency's discretion.

The duty in *Norton v. SUWA*, as well as in *MWA v. U.S. Forest Service*, was unequivocal. For example, in the

Montana Wilderness Study Act, Congress decreed that the WSAs "*shall . . . be administered* by the Secretary of Agriculture so as to maintain their presently existing wilderness character and potential" for wilderness designation. Pub. L. No. 95-150, §3, 91 Stat. 1244 (emphasis added). The statute did not establish general goals for the Forest Service or merely authorize the agency to act at its own discretion. Rather, the Forest Service had continuing duties both to preserve the wilderness character of the WSAs, as it existed in 1977, and to preserve their potential for wilderness designation.

BLM's claim—namely, that judicial review is not available if the agency has discretion about how to carry out the action to be compelled—has no basis in the APA. As this Court has observed, Congress intended the APA be read broadly, and the APA's "'generous review provisions' must be given a 'hospitable' interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)). Judicial review of an agency's failure to act, in violation of an express statutory mandate, is essential to ensure agency compliance with the statute. Barring judicial review would create a zone of agency immunity from its blatantly unlawful and irreparably harmful inaction. *Cobell v. Norton,* 240 F.3d 1081, 1095 (D.C. Cir. 2001) (absent judicial review of action inaction, "agencies could effectively prevent judicial review of their policy determinations by simply refusing to take final action").[13]

[13] As noted in footnote 10, the Forest Service has studiously avoided making any decision that would be subject to the administrative review process or judicial review under §706(2).

B. The Forest Service's Failure to Maintain Presently Existing Wilderness Character and Wilderness Potential, Which Has Led Directly to Irreparable Harm, Is Final

BLM also maintains that BLM's inaction is not final agency action because the action withheld—preventing impairment of wilderness values—would not itself be a final agency action. BLM Br. 15-20. BLM's extreme position distorts the statutory language and serves no practical purpose other than to immunize unlawful agency inaction from review. Rather than eliminate an entire category of litigation brought to challenge statutory violations that cause irreparable harm, the Court should establish criteria to guide lower courts in determining whether the agency's failure to act may be deemed final.

The APA defines "failure to act" as a species of agency action, just as it defines a "rule" as a type of agency action. 5 U.S.C. §551(13). In both instances, only a *final* agency action—that is, only final failure to act or a final rule is reviewable. *Id.* §704. Nothing in the APA, however, supports BLM's position that §704 should be read to limit judicial review to a "final ['failure to act]" where the action to be compelled also is a final agency action. There is only one finality requirement in the APA, not two, and that requirement applies to the challenged agency action, in this case a "failure to act."

Concededly, deciding whether an agency's failure to act is final is not always as clear as when the agency takes a specific action, such as adopting a rule or establishing a final plan of action based on a record of decision. In some cases, such as the failure to issue a regulation by a statutory deadline, the finality is clear enough. In other cases, however, finality must be established by reference to pragmatic criteria derived from the purpose of the finality requirement.

The finality requirement in §704, like the ripeness doctrine, is designed to prevent premature judicial review of agency action or inaction. *Abbott Laboratories*, 387 U.S. at 148 (the "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties"). In *Bennett v. Spear*, 520 U.S. 154 (1997), which involved a suit under §706(2), the Court stated:

> First, the action must mark the "consummation" of the agency's decisionmaking process—it must not be merely of a tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Id. at 177-78 (citations omitted). In the context of a §706(1) suit, these cases suggest that whether an agency's failure to act may be deemed final should depend on the degree to which the failure to act causes or imminently threatens to cause significant irreparable harm, and the extent to which the duration of the agency's failure to act demonstrates that as a practical matter the failure to act has reached the consummation of the agency's decisionmaking process. These considerations, which must be evaluated in the context of a particular case, play off each other. As the extent or significance of irreparable harm increases, the duration of the agency's inaction becomes less significant.

Modest, narrowly confined injuries, with little impact on the broader public may justify greater delay; failure to act in these circumstances may be more a matter of setting agency priorities than a final agency action. Similarly, if the agency has persuasively demonstrated that it intends to fulfill its

duties, and the harm from delay is limited, the failure to act may not be final agency action.

But where an agency's failure to act has caused or imminently threatens to cause significant, irreparable harm to unique resources of public significance (and thus to plaintiffs who enjoy these resources as Congress intended), an agency's failure to act should be deemed final based on a shorter period of inaction.

In two extreme circumstances, the length of inaction is irrelevant. First, where the agency has missed a statutory deadline, the failure to act is final. *Brock v. Pierce County*, 476 U.S. 253, 260 n.7 (1986). Second, where the agency denies that it has a mandatory duty or refuses to acknowledge its statutory obligation, the scales tilt conclusively to a determination that its failure to act is final. In taking such a position, the agency has signaled that it will never act. *See Sierra Club v. Thomas*, 828 F.2d at 793 (judicial review is appropriate in light of "agency recalcitrance . . . of such magnitude that it amounts to an abdication of statutory responsibility").

In *MWA v. U.S. Forest Service*, the agency's failure to act extended over two decades. MWA and other organizations and individuals repeatedly brought to the Forest Service's attention that rapidly growing ORV use was damaging wilderness values in the Montana WSAs, but the Forest Service refused to act and even facilitated greater ORV use. Moreover, the Forest Service took the position that it did not have a duty to maintain the "presently existing" wilderness character of the WSAs; its sole duty was the different and lesser obligation to ensure their potential for wilderness designation. 146 F. Supp. 2d at 1123.

Further, the record in *MWA v. U.S. Forest Service* illustrates how the Forest Service's failure to act has caused and continues to cause significant irreparable injury to the

wilderness character that existed in 1977 as well as to the potential for wilderness designation. The ever-increasing injury to the WSAs prevents recreationalists from enjoying the wilderness experience Congress intended to provide, and it threatens to eliminate Congress' option to designate these areas as wilderness. The agency's failure to act is particularly acute in cases, such as these, that are based on preservation statutes. Once a wilderness (or historic building, or endangered species, or anthropologically significant artifact) is significantly damaged, it no longer possesses the cultural, historical, scientific, and aesthetic value that Congress originally recognized in it and sought to protect. Areas where ORV use has scarred the land, spread noxious weeds, damaged critical habitat, and driven off endangered and other species cannot be brought back to its pristine condition, to its wild, primeval state, within the time-scale of human lifetimes, if at all.

These circumstances—the Forest Service's refusal to act over the course of two decades, irreparable injury to the wilderness values of the WSAs, and the agency's denial that it even has a duty—are more than enough to conclude that the Forest Service's failure to act was final.

C. Granting Injunctive Relief under §706(1) Would Not Intrude upon the Agency's Management Discretion

BLM expresses great alarm that allowing suits to compel compliance with an express statutory mandate, such as the duty to maintain the status quo in wilderness study areas, would impermissibly inject courts into agencies' "day-to-day" management decisions, and would permit "programmatic" review of agency policies. BLM Br. 17-18, 20, 30-35, 37-38 (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990)). As illustrated by *MWA v. U.S. Forest Service*, BLM's position is wholly divorced from reality.

After finding that the Forest Service's failure to act violated its mandatory duty to maintain the presently existing wilderness character of the Montana WSAs and their potential for wilderness designation, the District Court issued a simple remedy. It granted a declaratory judgment that the Forest Service had violated the MWSA, 146 F. Supp. 2d at 1127, and it enjoined the Forest Service "from taking any action" in the WSAs "that diminished the wilderness character of the area as it existed in 1977 or that diminished the area's potential for inclusion in the National Wilderness Preservation System" and ordered the Forest Service to "take reasonable steps to restore the wilderness character of any [WSA] as it existed in 1977 if the area's wilderness character or its potential for inclusion in the National Wilderness Preservation System has been diminished since 1977." *Id.* In other words, it ordered the Forest Service to fulfill its statutory duty.

Nothing in the District Court's order specifies how the Forest Service must comply. The District Court did not specify a limit on the number of ORVs, instruct the Forest Service what trails, if any, to close to ORV use, or impose any other detailed requirement in which the Court substituted its judgment for that of the agency. On the contrary, the District Court carefully noted the Forest Service's "unique expertise" to implement the MWSA, *id.* at 1126, and issued a simple injunction requiring the Forest Service to begin obeying the law. The order deliberately leaves the Forest Service considerable discretion about a vast range of choices. The only limit—a limit imposed by Congress—is that the Forest Service's management, taken as a whole, must maintain the wilderness character of the WSAs and must maintain their potential for congressional designation as wilderness areas.

BLM's suggestion that this case is closely analogous to or even governed by *Lujan* is equally misplaced. In *Lujan*,

the Court was concerned that litigation would become another forum to debate and resolve broad policy issues, thereby impermissibly blurring executive and judicial functions. 497 U.S. at 891. Federal courts, it observed, could "intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Id.* at 894. Nothing of the sort occurred in *Norton v. SUWA* or *MWA v. U.S. Forest Service.* Faithfully adhering to *Lujan*'s holding that a nationwide program is not a final agency action, *id.* at 890, the plaintiffs in *MWA v. U.S. Forest Service*, just like the plaintiffs in *Norton v. SUWA*, challenged agency violations on specific parcels about which there was substantial, specific evidence that wilderness values were being irreparably harmed.[14] Nothing in this litigation seeks to challenge the Forest Service's nation-wide (or even region or state-wide) wilderness preservation policies or programs.

Finally, BLM insinuates that the Ninth Circuit's remand for a trial is further proof of the ill effects of §706(1) review. BLM Br. 32-33. It is important to bear in mind that the Forest Service requested the remand. Realizing that its interpretation of the MWSA—namely, that it had no duty to maintain the then-presently existing wilderness character of the WSAs—had no basis in the statute, and that the great bulk of the evidence showed that its failure to act was irreparably harming the WSAs' wilderness character, the Forest Service argued that it had submitted sufficient

[14] MWA's suit was not an across-the-board challenge to the Forest Service's management policies. On the contrary, the suit focused on WSAs whose boundaries Congress had carefully delineated on maps to include salient features befitting wilderness designation. Pub. L. No. 95-150, §2(a), 91 Stat. 1243-44. Moreover, although seven WSAs remain subject to the MWSA, the suit involves only six of them because there was no evidence of violation or injury affecting the Blue Joint WSA. Far from being a programmatic attack, MWA tailored the suit to the evidence of agency inaction and injury in individual areas.

evidence to create a genuine issue of material fact. The problem, if there is one, is of the Forest Service's own making.

More centrally, there is nothing remotely problematic about a trial on the question whether the Forest Service maintained the wilderness character and potential of the WSAs. Such an inquiry draws on the core competence of courts—to gather and evaluate facts in the context of concrete and narrowly drawn disputes and apply those facts to statutory standards. Most such cases would be decided on summary judgment, thereby precluding trial. But where there are genuine issues of material fact, a trial is the only mechanism to resolve those issues.[15] The potential risk of unwarranted judicial intrusion into agency discretion arises not in the trial, but when the court issues its remedy. But district courts have broad discretion to tailor relief both to hold an agency accountable to its statutory mandate and to defer to agency expertise about how to comply with that mandate. As the District Court's order in *MWA v. U.S. Forest Service* illustrates, courts can order compliance without issuing detailed remedial orders. The risk that some court, some day, may exceed these limits is no basis to preclude all cases where the agency's failure to act violates its statutory duty and meets the criteria for final action.

[15] A trial is not necessary where the agency takes an action subject to §706(2) review. In such a case, the agency would have created an administrative record subject to the standard of review in §706(2)(A). Here, however, the Forest Service steadfastly refused to take any action subject to §706(2) review and has not created a corresponding administrative record. A trial would permit the Forest Service, together with MWA, to create the necessary record.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

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Respectfully submitted,

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